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Supreme Court, U.S.
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No. (1)

IN THE

Supreme Court of the United States

ARTHUR "SKIP" CROSS

Petitioner

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY and DIVERSIFIED FOODS, INC.

Respondent

On Petition For Writ of Certiorari
To the Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In disability claims governed by ERISA (Employee Retirement Income Security Act),wherein the plan administrator is, by plan terms, afforded discretion, does failure of the administrator to consider, or provide reasons for rejecting, expert opinion constitute abuse of discretion and/or denial of "full and fair review"?

2. Should the deference accorded respondent's decision be reduced because of conflict of interest?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below:

OPINIONS BELOW

The opinion of the United States District Court appears at Appendix A to the petition and has been designated as unpublished.

The opinion of the United States Court of Appeals appears at Appendix C to the petition and has been designated as unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act of 1974, As amended ("ERISA") provides in pertinent part:

29 U.S.C. §1132(a)(1)(B)

1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

STATEMENT OF THE CASE

Petitioner was insured under Respondent Diversified Foods and Seasonings, Inc.'s Long Term Disability Plan (hereinafter "Plan"), which is an ERISA plan formed by Diversified Foods and Seasonings, Inc. Petitioner will, unless otherwise noted, refer to the insurer, Reliance Standard Life Insurance Company (hereinafter Reliance Standard), as respondent.

Petitioner apparently filed an abortive claim for long term disability benefits on April 10, 2002 (R.A.-p.222-224) and anticipated filing for Social Security Disability benefits on May 1, 2002 (R.A. p.222), but ambivilated and kept working against medical advice. Even back then, April 3, 2002, his then treating cardiologist, Dr. Carlos M. Sotolongo, felt that he should not work at even a sedentary job (Class 4) and that he should "never" return to full or part time work (R.A.-p.462). On April 18, 2002, Dr. Sotolongo stated that petitioner had "recently been contemplating retirement." He noted that petitioner "had a lot of symptoms of shortness of breath and chest discomfort" and that two weeks prior petitioner "got up to dance and only a minute into the dancing he developed a very severe chest pain which scared him. He has been too scared to do anything since then." Dr. Sotolongo planned conservative treatment, but said, "My recommendation to him is that he retire as I think his work is bringing on a significant amount of stress in his life."(R.A.-p.462)

On February 24, 2003, Dr. Gregory Groglio performed bypass surgery on petitioner (R.A.-p.450). On August 5, 2003 (R.A.-p.275) and October 30, 2003 (R.A.-p.273), petitioner was treated by cardiologist

Barry A. Kusnick for fatigue.

On January 21, 2004, five months before retiring, petitioner underwent a hemodynamic study which indicated blood pressure of 150/93 with high mean arterial pressure and left cardiac work. On February 4, 2004, four months before retiring, an adenosine cardiolite stress test performed that day by Dr. Kusnick was clinically positive for ischemic and scintigraphically abnormal consistent with anterior angina with abnormal wall motion and septal hypokinesis (R.A.-p.282). On March 4, 2004, three months prior to retirement, although Dr. Caren urges that the cardiolite stress test performed that day by Dr. Kusnick was negative for ischemia, it was clinically and electrocardiographically borderline positive for myocardial ischemia with ST segment abnormalities (R.A.-p.284). On April 21, 2004, petitioner considered seeking the same job with another company and began sending out resumes through June 7, 2004 (R.A.-p.109-122).

On June 7, 2004, eighteen days before retiring, petitioner treated with Dr. Kusnick complaining of dyspnea on walking from the front door to the car and fatigue. He complained of severe excess work stress, including a very adversarial supervisor and lots of problems...(undecipherable). His blood pressure was 140/90.(R.A.-p.458) He was to return in 4-6 weeks (R.A.-p.459).

Subsequent to his dialog of June 7 with Dr. Kusnick, by June 10, 2004, petitioner had decided to finally take care of his health and retire. He talked to his employer and obtained and signed a disability claim form (R.A.-p.190) and an attending physician's form ((R.A.-p.469-470).

After advising Dr. Kusnick of his final decision on June 23, Dr. Kusnick sent a letter to respondent, stating:

> Please be advised that Mr. Arthur Cross is now classified as permanently disabled effective immediately. It is my medical opinion, due to Mr. Cross' extensive cardiovascular history as well as his continued physical decline and increase in objective symptoms that Mr. Cross discontinue full or part-time work immediately. Mr. Cross has undergone extensive medical evaluation and treatment which includes 14 heart catheterizations, 2 angioplasty interventions, 3 coronary artery stent placements, an aortic valve replacement in June 1982 and a multi-vessel coronary artery bypass graft open-heart surgery in February 2003. His care has included optimal medication management and an extensive medical rehabilitative regimen. Mr. Cross has reached his maximum medical rehabilitative state. He is on multiple cardiovascular medications which include Zocor, Hyzaar, Coumadin, ASA, Lexapro, Protonix, Foltx, Altace, Restoril, and Benadryl and due to his aortic valve disease/replacement Mr. Cross must maintain a therapeutic anticoagulated state and is followed in our Coumadin clinic weekly. (R.A.-p.457) (emphasis supplied)

Contemporaneously, he executed the attending physician's form, in which he stated that petitioner had "severe" coronary artery disease, aortic valve stenosis, "severe shortness of breath," fatigue, weakness and spondylosis. He also felt petitioner should limit his

standing, sitting, walking and driving to one hour a day each and his bending, squatting, climbing , etc. to "infrequent" occasions (0%-33% of the day). A cardiologist, he felt that petitioner had a Class 3 heart condition (American Heart Association scale). Finally, he stated that petitioner had achieved his "maximum medical rehab state," that he should never return to work and that he was permanently disabled (R.A.-p.469-470).

On June 25, 2004, petitioner's employer executed claim forms indicating that petitioner's occupation could not be modified to accommodate petitioner's disability, nor would offering petitioner assistance resolve the problem (R.A.-p.225-226).

On June 25, 2004 petitioner submitted a claim for disability benefits, terminating his employment as of that date.

On July 8, 2004, respondent executed a form indicating that, based on the claim file, petitioner's case had "been reviewed by a Social Security Specialist" and that it was recommended that petitioner "pursue Social Security Disability Income" benefits (R.A.-p.208).

On July 26, 2004, petitioner treated with Dr. Kusnick and told him he had walked 1 ½ miles in 35 minutes (R.A.-p.267).

On August 4, 2004, Dr. Kusnick wrote to the Benefits Administrator for petitioner's employer to advise her that "Mr. Cross' disability status has not changed nor is it expected to change in the future."(R.A.-p.399) On August 25, 2004, Dorothy McGarry, R.N., B.S.N., C.R.R.N., undertook a medical/vocational review limiting petitioner to sedentary work. (R.A.-p.261)

On September 8, 2004, respondent's Claim Manager, Robert Loy, requested a review from Dr. Marvin Goldstein (R.A.-p.260). In response, Dr. Goldstein found that petitioner could perform a light duty occupation, that there was no apparent cardiac change around June 2004, and that there was no evidence that petitioner "has exceeded his demonstrated physical capacity." (R.A.-p.256)

On September 24, 2004, respondent, Reliance Standard, rejected petitioner's claim for benefits (R.A.-p.75-79).

Petitioner appealed the decision on November 8, 2004, but withdrew the appeal.

On December 7, 2004, petitioner, who had moved to Charlotte, North Carolina, was treated for the first time by cardiologist Dr. Richard M. Jacoby. Dr. Jacoby noted the "Adenosine Cardiolite Stress Test 02/04/04 showing anterior ischemia" with chest tightness on walking about 200-300 feet. He described the stress test as "abnormal" and described petitioner's angina as sounding "fairly severe." (R.A.-p.41-43)

On December 15, 2004, petitioner underwent a 2D-echocardiogram and carotid artery Doppler, the latter of which indicated "high grade left subclavian artery stenosis." (R.A.-p.53-54) On December 23, 2004 petitioner again visited Dr. Jacoby, relating chest discomfort on walking 200 yards. Dr. Jacoby noted that petitioner's exertional angina seemed to have increased slightly. He also proposed that the left subclavian stenosis might be compromising the flow of the LIMA (left internal mammary artery) and suspected (correctly) that a LIMA had been used for the coronary bypass (R.A.-p.39-40).

On February 17, 2005, Dr. Jacoby wrote to Dr.

Peter Le, petitioner's new primary treating physician. He stated (R.A.-p.33) that:

> When walking 30 yards, he becomes dyspneic to the point where he must stop. He is not able to bend over and do work loading his car. He has had some edema in his hands and his feet but more in his hands.
>
> ...
>
> I will review his functional limitations with him at his next visit.

On March 3, 2005, petitioner again saw Dr. Jacoby, who provided a diagnosis, in addition to coronary artery disease, of "chronic congestive heart failure." (R.A.-p.35) Dr. Jacoby also provided a statement of functional limitations, saying (R.A.-p.36):

> I am a cardiologist helping care for Mr. Arthur Cross. He is a 56-year-old male with a complex past medical history including Starr-Edwards aortic valve replacement in 1982 and subsequent coronary bypass February 2003. Ever since around the time of his bypass he has had ongoing problems with dyspnea on exertion which have poorly responded to changes in medication. His past history also includes a known left subclavian artery stenosis which may impair flow to his mammary artery graft as well as nonobstructive coronary stenosis, hyperlipidemia, multiple coronary interventions, Hydrochlorothiazide, obstructive sleep apnea, and TIAs.
>
> Functional limitations currently include dyspnea on exertion requiring cessation of activity with activities of daily living including drying off after taking a shower, taking the

> trash out, [climbing] one flight of stairs, or walking one-half block. These functional limitations would make meaningful employment difficult.

Petitioner refiled his appeal through his then attorney, Edward G. Connette, on March 11, 2005 (R.A.-p.20).

Attorney Connette submitted relevant treatment records to consulting internal medicine specialist William G. Porter, M.D. On March 16, 2005, Dr. Porter issued a report which stated (R.A.-p.9-10):

> . . . I conclude, as have all the cardiologists who have treated him, that Mr. Cross is totally and permanently disabled for any occupation, based on the following medical conditions:
>
> 1. Multi-vessel coronary artery disease that remains symptomatic despite multiple medical and surgical interventions.
> 2. Prosthetic aortic valve with a history of TIAs and CT evidence of multiple cerebral infarcts despite coumadin therapy.
> 3. Uncontrolled hypertension with left ventricular hypertrophy.
> 4. Obstructive sleep apnea. . . .
>
> **A normal graded exercise test is but one factor that should be weighed in analyzing this case. The assessment of prognosis for Mr. Cross's several medical problems requires that the role of job stress, and its known adverse effects on the symptoms and progression of coronary artery disease, be taken into account. This assessment is necessarily more subjective,**

> **but no less important, than the results of an exercise test.**
>
> **It is my opinion that Mr. Cross's physicians have been correct when they advised him to quit work, based on the probability that continued employment, even in a relatively sedentary occupation, would pose considerable medical risk to Mr. Cross. Job-related stress would make his hypertension more difficult to control, which in turn would hasten the progression of his coronary artery disease and increase the risk of more cerebral infarctions and brain damage.** (emphasis supplied)

Finally, not to be outdone, respondent sent some pertinent medical records, **plus a copy of respondent's rationale for denying benefits** (R.A.-p.251), to another consultant, internist and cardiologist Dr. Jeffrey F. Caren. On April 26, 2005, Dr. Caren issued a report (R.A.-p.251-254) stating that petitioner's ability to walk 200 yards indicates Class 2 heart disease. Taken with the stress test of March 4, 2004, he felt that petitioner could perform "light work."

Petitioner's appeal was rejected on June 16, 2005 (R.A.-p.2). **Respondent, in its decisions, provided no reasoning for rejecting the findings of the treating physicians nor of one of their experts, Nurse McGarry.**

Petitioner filed suit in United States District Court for the Eastern District of Louisiana on July 6, 2006. The parties filed cross-motions for summary judgment, and, on April 20, 2007, Judge Lance M. Africk rendered judgment in favor of defendants/appellees Diversified

Foods and Seasonings, Inc. and Reliance Standard Life Insurance Company and against plaintiff/appellant Arthur Cross.

Petitioner then appealed to the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the decision of the district court, finding that respondent's determination was not arbitrary and capricious, nor did it fail to provide full and fair review.

REASONS FOR GRANTING THE PETITION

1. In disability claims governed by ERISA (Employee Retirement Income Security Act),wherein the plan administrator is, by plan terms, afforded discretion, does failure of the administrator to consider, or provide reasons for rejecting, expert opinion constitute abuse of discretion and/or denial of "full and fair review"?

There is a conflict between the Circuit Courts as to whether, in disability insurance claims under plans governed by ERISA and according deference to the administrator, arbitrary refusal to credit a claimant's reliable evidence, including the opinions of a treating physician, constitutes "arbitrary and capricious" action and failure to provide "full and fair review."

Five years ago, in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003), this Court stated, "Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." Since then, the Third, Fourth and Ninth Circuits have held that arbitrary refusal to credit a claimant's reliable evidence, including the opinions of a treating physician, constitutes reversible error. The Sixth Circuit appears to be in agreement, requiring the administrator's

expert to explain his disagreement with the treating physician. But, in the case at bar, the Fifth Circuit has held that, though some treating physician opinions were entirely ignored and others were rejected without specifying cause or, at best, for indefensible reasons, respondent's denial of benefits constituted full and fair review and was not "arbitrary and capricious."

In the Third Circuit, in *Addis v. the Limited Long-Term Disability Program*, 425 F.Supp 2d 610 (E.D. PA 2006), the Court said:

> When the Supreme Court held, in Black & Decker Disability Plan v. Nord, 538 U.S. 822, 829-30, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003), that the rule giving special deference to a treating physician's opinion in Social Security disability cases did not apply to ERISA disability cases, it did not grant plan administrators a license to disregard or only cursorily consider the opinions of the physicians who were familiar with and treated the claimant. The Court concluded that deference may not be warranted when a treating physician had only a short relationship with the patient, or when the plan's retained consultant is a specialist and the treating physician is a general practitioner. Id. at 832, 123 S.Ct. 1965. At the same time, it acknowledged that a treating physician in many cases has a better opportunity to know and observe the patient than do consultants retained by a plan. Id.
>
> Nord did not state that treating

> physicians' opinions are never entitled to deference over retained consultants' opinions. Rather, Nord- instructs that "courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician," and that courts may not "impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation." Id. at 834, 123 S.Ct. 1965.
>
> The Supreme Court's instruction does not authorize a plan to give conclusive weight to an unreliable report of a nontreating physician. Nor does it insulate plan decisionmakers every time they decide to overrule a treating physician's report in favor of a consultant's opinion. Nord, 538 U.S. at 834, 123 S.Ct. 1965 ("Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician.").

And in the Fourth Circuit in *Stup v. UNUM Life Ins. Co. Of Am.*, 390 F.3d 301 (4th Cir. Md. 2004) the Court said:

> UNUM confuses this substantiality requirement with the "treating physician" rule outlawed in Black & Decker Disability Plan v. Nord, 538 U.S. 822, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003). UNUM argues that the district court

> "erroneously applied" the treating physician rule. The argument is meritless. The district court did not "require" UNUM "to accord special weight to the opinions of [the] claimant's physician," which Nord prohibits. Id. at 1972. Rather, the district court simply concluded that UNUM failed to adhere to the substantiality requirement by arbitrarily disregarding Stup's reliable evidence, including the opinion of her treating physician, relying instead on ambiguous and insubstantial evidence favoring UNUM's own economic self-interest. It is thus UNUM, not Stup, that has failed to follow an instruction of the Nord Court, i.e., that "[p]lan administrators... may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." Id.

And, in the Sixth Circuit, in *Kalish v. Liberty Mutual Life,* 419 F.3d 501, 507 (6th Cir. 2005), the Court said:

> [T]he Supreme Court has acknowledged "that physicians repeatedly retained by benefits plans may have an incentive to make a finding of `not disabled' in order to save their employers[']] money and preserve their own consulting arrangements." Black & Decker Disability Plan v. Nord, 538 U.S. 822, 832, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003) (citation and quotation marks

omitted). This court has similarly observed that a plan administrator, in choosing the independent experts who are paid to assess a claim, is operating under a conflict of interest that provides it with a "clear incentive to contract with individuals who were inclined to find in its favor that [a claimant] was not entitled to continued [disability] benefits." Calvert v. Firstar Fin., Inc., 409 F.3d 286, 292 (6th Cir.2005) (noting that the "possible conflict of interest inherent in this situation should be taken into account as a factor in determining whether [a plan administrator's] decision was arbitrary and capricious") (quotation marks omitted). Thus, although "routine deference to the opinion of a claimant's treating physician" is not warranted, we may consider whether "a consultant engaged by a plan may have an `incentive' to make a finding of `not disabled'" as a factor in determining whether the plan administrator acted arbitrarily and capriciously in deciding to credit the opinion of its paid, consulting physician. See Nord, 538 U.S. at 832, 123 S.Ct. 1965.

...

Dr. Conrad, in arriving at a contrary opinion, does not explain why he disagreed with Dr. Rasak's conclusions. See Calvert, 409 F.3d at 296 (finding a reviewing physician's report to be

> inadequate because, even though the reviewing physician "does mention [the claimant's doctors] by name, he does not explain why their conclusions. . . were rejected out-of-hand").
>
> The fact that Dr. Rasak had the opportunity to physically examine Kalish on numerous occasions, while Dr. Conrad relied exclusively on a file review, makes Dr. Conrad's failure to discuss the findings of Dr. Rasak all the more troublesome.

The Ninth Circuit in *Glenn v. Metlife*, 461 F.3d 660 (6th Cir., 2006), in reversing the district court and awarding benefits, said:

> As noted above, the plan administrator need not accord special deference to the opinion of a treating physician. By the same token, it may not arbitrarily repudiate or refuse to consider the opinions of a treating physician. See Black & Decker Disability Plan, 538 U.S. at 834, 123 S.Ct. 1965. In its final rejection of Glenn's claim, however, MetLife did not indicate that it had considered Dr. Patel's letter of February 12, 2003, nor did it provide a reason for rejecting it.3 It also did not indicate whether or not it had considered Dr. Patel's letter of July 22, 2002, which was consistent with the February 12 letter advising that Glenn could not return to work.
>
> In the instant case, it is evident that respondent

relied entirely on the opinions of its hired consultants. In *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003), the United States Supreme Court held that the "treating physician" rule, requiring automatic deference to the opinion of a treating physician, did not apply to disability claims under ERISA. While rejecting an automatic rule to that effect, however, the Court by no means granted ERISA plan administrators *carte blanche* to disregard treating physicians' views, saying:

> As compared to consultants retained by a plan, it may be true that treating physicians, as a rule, have greater opportunity to know and observe the patient as an individual. Nor do we question the Court of Appeal's concern that physicians repeatedly retained by benefit plans may have an incentive to make a finding of not disabled in order to save their employers money and to preserve their own consulting arrangements. But the assumption that the opinions of a treating physician warrant greater credit than the opinions of plan consultants may make scant sense when, for example, the relationship between the claimant and the treating physician has been of short duration, or when a specialist engaged by the plan has expertise the treating physician lacks. 538 U.S. at 832 (internal punctuation omitted)

Thus, while the Supreme Court declined to require deference to treating physicians' views in every

case, it clearly indicated that factors such as length of relationship with the patient and relative expertise must be taken into account when determining the weight to accord medical opinions. In that context, the Court's admonition that "[p]lan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician," id. at 834, resonates quite clearly.

The law requires that, because the insurance contract (the plan) provides for deference to respondent's interpretations of fact and law, that deference must be accorded, despite respondent's obvious self-interest, unless it can be shown that their actions indicate that they are not acting as an honest broker.

In this case, Mr. Cross has undergone 14 heart catheterizations, two angioplasty interventions, three coronary artery stent replacements, an aortic valve replacement in June 1982, and a multi-vessel coronary artery bypass graft open-heart surgery in February 2003. His care has included optimal medication management and an extensive medical rehabilitative regimen. (R.A.-p.457)

Three treating cardiologists, one consulting cardiologist and one of respondent's own experts agree that he should not be working at any occupation, particularly a high stress occupation such as his own. (Petitioner had been working against medical advice for a couple of years before finally retiring, not without considerable ambivalence.) Arrayed against them are two consultants whom respondent retained but who never saw petitioner.

Respondent's decisions offer no reasoning for rejecting three of these opinions, not even mentioning

two of them. No specific reasons were given for rejecting the findings of the remaining treating and consulting physicians nor the nurse reviewer. If the denial does obliquely offer such reasoning, it is strained and demonstrably incorrect. Arbitrary failure to credit the opinions of a treating physician or other reliable evidence has been proscribed by this Court *(Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003). Obviously, no reason at all cannot constitute good reason.

Petitioner urges that, though the physical activity associated with his occupation is no doubt a malevolent influence, the essential basis for his disability is the stress associated with his position as national sales manager. The findings of the treating cardiologists are that the stress of any employment, much less this position, is dangerous to petitioner's health. These opinions are unrefuted by any medical source, yet they were rejected by respondent.

Petitioner has stipulated that he could have physically performed the requirements of his job on the day after he retired, but only if the effects of such continued work are not a consideration. He simply finally acceded to his physicians' advice that the stress of his occupation was exacerbating his coronary condition.

Presumably, if the reasons given for rejecting a medical opinion are not sufficient, then it has been rejected "arbitrarily." If insufficient reasons render a decision arbitrary, how arbitrary is no reason at all? Petitioner urges that this violation of the clear instructions of the Supreme Court demonstrates "advance(ment of) the conflicting interest of the fiduciary at the expense of the affected beneficiary"

(See *Wildbur v. ARCO Chemical Co.*, 974 F.2d 631 (5th Cir. 10/12/1992; *Vega v. Nat'l Life Insur. Servs.*, 188 F.3d 287 (5th Cir. 1999)) and should constitute failure to provide full and fair review.

Petitioner's claim of disability was strongly supported by petitioner's treating cardiologist, Dr. Kusnick. It is also supported by the findings of petitioner's previous treating cardiologist, Dr. Sotolongo, who recommended petitioner retire years prior.

The Court will find no mention of the name Dorothy V. McGarry R.N., B.S.N., C.R.R.N. in either decision rendered by respondent, nor does it appear in the list of medical records and opinions provided to respondent's consultants, nor did it appear in respondent's brief. Yet, after receipt of the record, including Dr, Kusnick's opinion, respondent submitted the file to Nurse McGarry, who certified that she has "the training and experience in the area of nursing practice encompassed in this review." (R.A.-p.261) Nurse McGarry found that petitioner's R&L (restrictions and limitations) limited him to sedentary, not light, work and that the limitations were "Permanent." Nurse McGarry commented:

> 56 yo with Coronary Artery Disease with history of 14 heart catheterizations, 2 angioplasties, 3 stent procedures and an aortic valve replacement in 2003. Documentation supports claimant continued to work beyond expectations until he became so fatigued he was falling asleep in meetings and short of breath walking in airports. Cardiolyte Adenosine Stress Test March 2004

> demonstrated advanced heart disease. Although claimant exercised to 9.4 mets he had an abnormal adenosine portion which was positive for chest pain and moderate ischemic changes. Based on this information, it appears claimant capable of sedentary restrictions and limitations. Consider vocational outreach.

Respondent, however, made no mention of Nurse McGarry's report and found that petitioner could perform "light," not merely "sedentary," work. Petitioner's past work was at the "light" level of exertion.

As noted, the decision rejects the findings of Dr. Kusnick without stating a reason. In fact, nowhere did respondent even state that a medical opinion had been rejected, much less offer a reason for such rejection. But if reason there be, it is apparently contained in the notation that Dr. Kusnick stated on June 23, 2004 that petitioner was at a "maximum medical rehabilitative state," though petitioner "never participated in the cardiac rehabilitation program following his bypass surgery."(R.A.-p.4) (emphasis supplied)

Petitioner is constrained to ask how respondent knows that this is an inconsistency? What makes respondent think that cardiac rehabilitation can only be achieved through a supervised rehabilitation program? Is it the medical opinion of respondent's adjustor, Ms. Regina Angiolillo, that the walking and exercise regimen Dr. Kusnick prescribed when petitioner's employer refused to approve the supervised program could not achieve the same result? If so, her

signature line fails to identify her credentials as a cardiologist, physician, nurse or medical worker of any kind (R.A.-p.7) that would qualify her to refute the treating cardiologist's statement. Dr. Kusnick considered the walking and exercise regimen to have been "extensive." Apparently petitioner ceased his regimen at a later date and could have then benefitted from reinstitution of rehabilitation. (Around the time of Dr. Kusnick's statement, petitioner was walking 1 ½ miles, but the treatment notes of Dr. Jacoby in 2005 reflect that petitioner "has not been exercising" and that he had chest discomfort at about 200 yards of walking (R.A.-p.37).) There is no medical opinion refuting Dr. Kusnick's statement–none whatever.

Thus, if this notation is intended to constitute the basis for rejecting the findings of Dr. Kusnick, the question, then, is whether:

1. In the absence of any supporting expert opinion;

2. In the absence of ever seeing Mr. Cross, much less at the time of Dr. Kusnick's statement;

3. In the absence of any inquiry as to the nature and extent of the "medical rehabilitative regimen" Dr. Kusnick substituted; and

4. In the absence of any demonstration of expertise on her part;

the opinion of Ms. Angiolillo as to Mr. Cross's "medical rehabilitative state" on June 24, 2004 constitutes sufficiently substantial evidence to reject the entirety of the findings of the primary treating cardiologist. If it is not sufficiently substantial, then the rejection was "arbitrary" and prohibited by *Nord*.

Petitioner urges that, even were respondent afforded full deference, a lay opinion in such a highly

specialized field as cardiology is essentially meaningless, can not conceivably be elevated over that of a treating cardiologist, and cannot constitute "substantial evidence" for rejecting Dr. Kusnick's findings. Moreover, making such a reach in order to attempt to exclude the findings of a supportive physician without a reasonable basis do not reflect the judgment of an unbiased finder of fact. Rather, they further reflect a conflict of interests and demonstrate "advance(ment of) the conflicting interest of the fiduciary at the expense of the affected beneficiary" and should significantly reduce the discretion afforded respondent's interpretations of fact and plan terms.

The decision also rejects the statement of Dr. Porter that "Job-related stress would make (Mr. Cross's) hypertension difficult to control...." Respondent compares petitioner's blood pressure readings on two dates as proof of the surprising proposition that job stress cannot raise one's blood pressure. Petitioner replies that Dr. Porter's statement on the matter has not been refuted by any medical expert, including Dr. Caren, to whom Dr. Porter's report was submitted.

Thus, if Ms. Angiolillo's interpretation of the medical evidence constitutes substantial evidence to support the proposition that job stress cannot raise one's blood pressure, then respondent's rejection of Dr. Jacoby's findings on this matter did not "arbitrarily refuse to credit a claimant's reliable evidence." Otherwise, it did.

As to Dr. Jacoby's finding that Mr. Cross's functional limitations would make "meaningful employment difficult," the decision merely notes the statement (R.A.-p.4) and offers no basis whatever for

rejecting it. In fact, it does not reject Dr. Jacoby's findings. In fact, it does not even mention them again, totally ignoring them.

Dr. Sotolongo's opinion that petitioner was disabled as of April 2002, which respondent and the Court below entirely ignore, is clearly reliable evidence. It was not merely not credited, it was not mentioned.

Again, if insufficient reasons render a decision arbitrary, how arbitrary is no reason at all?

Dictionary.com defines "arbitrary" as "capricious; unreasonable; **unsupported**."(emphasis supplied). The decision's finding that Dr. Kusnick's remarks as to petitioner's conditioning are inconsistent is unsupported. And the finding that job stress cannot increase one's blood pressure is unsupported. Thus, were petitioner to proceed no further, he has shown that the bases for rejection of the findings of these treating physicians are **unsupported**, hence "arbitrary and capricious." But, irrefutably, the decision's rejections of the findings of Dr. Sotolongo, who said that petitioner should retire years before he actually did, of Dr. Jacoby, who said that petitioner's limitations would "make meaningful employment difficult," and of Nurse McGarry, who said, "Documentation supports claimant continued to work beyond expectations" and that he was limited to sedentary work, without any explanation whatever, constitute "arbitrar(y) refus(al) to credit...the opinions of a treating physician" or (for Nurse McGarry) "reliable evidence." This is precisely prohibited by the Supreme Court in *Nord* and clearly renders the decision "arbitrary and capricious," justifying and, petitioner urges, requiring reversal.

The U. S. Supreme Court appears to be

unequivocal in stating that administrators "may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." *Nord,supra.* There appears to be no basis for considering these sources to be unreliable. For those whose opinions were not mentioned or for whom no basis at all for rejection was offered, clearly the refusal to credit is arbitrary. For the other, the arbitrariness appears to be equally clear. The Supreme Court said it was not permissible, respondent did it anyway

A. The "common care and prudence rule."

Though petitioner cited to the recently published study of "Job Strain and Risk of Acute Recurrent Coronary Heart Disease Events," *Journal of the American Medical Association*, Vol. 298, No. 14 (October 10, 2007), which is wholly unrelated to physical strain, the Fifth Circuit Court of Appeals declined to distinguish between transient physical stress, such as is measured by a cardiac stress test, and the chronic, emotional stress imposed by employment.

In so doing, the Fifth Circuit failed to consider the "common care and prudence rule,' which was discussed in *Lasser v. Reliance Standard Life Ins. Co.*, 146 F.Supp.2d 619, 624 (N.J., 2001), a case in which respondent offered the same defense–that job stress was not a factor to be considered. The *Lasser* Court held:

> In summary, Dr. Burke's examination of Dr. Lasser involved a treadmill test and other examination techniques calculated to reveal what Dr. Lasser's physical

capacity was at the moment of the examination. Dr. Burke gave it as his professional opinion that "this individual does not demonstrate any cardiovascular disability."

...

[B]y focusing on transient physical capacity, Dr. Burke failed to appreciate the risk to Dr. Lasser posed by occupational stress. Indeed, there is no mention of this issue in Dr. Burke's report. By ignoring the question of occupational stress in relation to Dr. Lasser's cardiac health and what professional duties it is medically reasonable for him to perform, Dr. Burke is at odds with the formidable weight and, indeed, unanimity of the other cardiologists opining on this case.

...

Here is revealed the flaw in Dr. Burke's approach. Dr. Burke believes that if a patient can, at any given moment, perform at a certain level and if risk factors are minimized as much as possible, then other problems, such as...occupational stress, and other factors pointing to a risk of a catastrophic medical event in the future, are "not important" and indeed, not even "germane" to the question of disability. It is obvious even to the lay person that a person might minimize risk factors for a heart attack and yet still be so sick that

engaging in certain activities presents a medically unacceptable danger of future injury or death. This holds true even though, on any given day, that person might engage in such activities with no noticeable ill effect.

...

As will already be clear, the medical evidence overwhelmingly supported the fact that occupational stress posed a serious risk of further deterioration of Dr. Lasser's heart condition and of another heart attack. Speaking generally, Dr. Fields wrote: "[B]oth physical and emotional stress are identified triggers of acute myocardial infarction." Dr. Aldrich said, "[S]tress is a well-documented risk factor not only for the development of coronary artery disease itself, but within that context to the precipitation of a myocardial infarction." Likewise was Dr. Raska:

Stress regardless of exercise tolerance is a recognized independent risk factor for recurrent coronary artery disease.... [T]here are multiple studies in both humans animals and in the laboratory which demonstrate that stress causes flux in the level [of] catecholamines in the circulation which have been shown to be a precipitant of acute myocardial infarction and sudden death.

The doctors were no less emphatic in relating the general proposition to Dr.

Lasser's case. Dr. Lubow wrote, "However, the biggest risk to [Dr. Lasser] is physical and emotional stress that cannot be controlled easily.... **Such stress is accepted by all experts as a significant risk factor in coronary artery disease....**"

In the backdrop of the other doctors' opinions, it is notable that **Dr. Burke's report does not address occupational stress at all. The letter dated April 13, 1999, from Reliance purporting to set forth the reasons for denying Dr. Lasser's administrative appeal also makes no mention of the question of stress nor of its implications for Dr. Lasser.**

...

Finally, the Court cannot accept Walsh's analysis of risk of future harm in relation to present disability under the terms of the disability policy. It is a basic tenet of insurance law that an insured is disabled when the activity in question would aggravate a serious condition affecting the insured's health. (Citing authority) As noted in the Applemans' treatise, "The insured is considered to be ... disabled where it is impossible for him to work without hazarding his health or risking his life." 1C Appleman, *Insurance Law & Practice* § 651 at 241 (1981). In fact, this proposition is sufficiently well-settled that in many jurisdictions it travels under the name of the "**common care and prudence**

rule." E.L. Kellett, Annotation, *Continuation of Work as Affecting Finding of Total or Permanent Disability within Insurance Coverage,* 24 A.L.R.3d 8, § 3(a) (1969)....

Where medical prudence requires a cessation of work activity, the insured is disabled; insurers have failed to convince courts that risk of a heart attack in the future does not constitute a present disability. Pompe v. Continental Cas. Co., 119 F.Supp.2d 1004, 1010 (W.D.Mo.2000) ("[S]uch an approach would force patients with serious health risks to cripple themselves, or even risk death, in order to be considered disabled.... The law is not so harsh.") (citing Herring v. Canada Life Assur. Co., 207 F.3d 1026 (8th Cir.2000)). This is true even though the insured may be capable of physical activity. Honeysucker v. Bowen, 649 F.Supp. 1155, 1162 (N.D.Ill.1986). Clearly the risk of a heart attack may be a disabling factor even though the claimant can sit, stand, or ambulate. *Schlabach,* 469 F.Supp. at 314.

...

Walsh's continued reliance on Dr. Burke's opinion and on the New York Heart Association functional capacity scale is plainly error. Neither authority, as demonstrated, even considers the issue of emotional stress as a risk factor for a heart attack.

In the face of the strongly worded and unanimous opinions of the other cardiologists, Walsh was not free to disregard occupational stress, clearly the primary threat to Dr. Lasser's cardiac well-being.(emphasis supplied)

Petitioner also cites *Herring v. The Canaada Life Assurance Co.*, 207 F.3d 1026 (8th Cir. 2000), in which, as in the case at bar, the defendant had offered no evidence regarding the effects of job stress. The Eighth Circuit reversed because, "There is no evidence to suggest that Herring does not suffer from ...ASHD (arteriosclerotic heart disease);... nor is there any evidence to suggest that Herring's position does not involve a level of stress which could aggravate his condition."

See also *Hoover v. Provident Life & Acc. Ins. Co.*, 290 F.3d 801 (6th Cir. 2002), *Levinson v. Reliance Standard*, 245 F.3d 1321 (11th Cir. 2001) and *Cohen v. Standard Ins. Co.*, 155 F.Supp.2d 346 (E.D. Pa. 2001).

The Fifth Circuit relied heavily upon petitioner's reluctance to retire, especially his inquiry into the availability of similar positions with other employers.

Petitioner understands that **he** decided when he would quit working, and, at the same time that he claimed he could not work for defendant Diversified Foods, Inc., he was looking for a job elsewhere. Moreover, he thought his boss was very demanding. So, if he could not work for the defendant, how could he have worked for somebody else?

The answer is that he could have. Just as he could have, as claimant has stipulated, continued working for Diversified Foods.

It is claimant's call as to when he does stop working. But it is not his call as to when he **should** have stopped working.

Except for heart attacks, cardiac disability is ordinarily gradually progressive. There is no point at which one becomes suddenly disabled. One's treating

physician tells him it has gotten to the point where it is unreasonable to continue working. Some will retire immediately, others will get a bypass and try to work as long as possible, while the ravages of the disease bring progressive weakness, shortness of breath, and chest discomfort and pain. By the time Mr. Cross saw Dr. Jacoby on March 3, 2005, he had progressed to chronic diastolic congestive heart failure (R.A., vol. 2, p. 35), so that, obviously, he waited too long.

So Mr. Cross could control when he retired, but he could not control when he **should** have retired. Respondent would deny his benefits because he tried to get a lesser sales position to pay his rent and groceries. (There cannot be a lot of low pressure Director of National Sales jobs out there.)

Mr. Cross's forma pauperis affidavit is a part of the record. He finally realized that any such job would be stressful and that not one of his doctors advised him to get a less stressful job. They advised him to retire. Dr. Kusnick specifically prohibited even part-time work (R.A., vol. 2, p. 457). Mr. Cross finally retired. He has not worked at any job since he retired on June 25, 2004, and he is living off Social Security Disability Insurance Benefits of $1865 per month (*See* petitioner's forma pauperis petition to the Fifth Circuit Court of Appeals).

If the respondent should have deference, it is over the facts. Procedural requirements are supplied by the sparse regulations of the U.S. Department of Labor and the jurisprudence of the courts.

The contract does not exclude job stress. The respondent is accorded no deference whatever in deciding what etiologies to consider. Thus it cannot say that job stress cannot be considered as a malefactor

in Mr. Cross's cardiac disease.

The unanimous opinion of the physicians who considered the effects of job stress is that claimant should have retired. If respondent wanted to challenge those opinions, they should have. They made no such inquiry whatsoever, neither to the treating physicians nor to their own consultants, regarding the effects of job stress. Their inquiries focused only on claimant's ability to stand, walk, lift and carry.

Thus the findings of petitioner's treating and consulting physicians as to the effects of job stress are entirely unrefuted, or even mentioned. Nevertheless, they were rejected without stated reasons or without even mention.

ERISA claimants in the Fifth Circuit need clarification as to whether the instructions of the Supreme Court in *Nord* are mandatory or merely advisory.

2. Should the deference accorded respondent's decision be reduced because of conflict of interest?

In the case at bar, though respondent has a financial interest in the outcome of their decision, the deference afforded respondent was not diminished.

In his reply brief to the Fifth Circuit, prior to the granting of writs of certiorari by the U.S. Supreme Court in *Glenn*, petitioner stated, "*Glenn v. Metlife*, 461 F.3d 660 (6th Cir., 2006)...while not controlling, is so similar to the case at bar, it is quoted at length." Accordingly, petitioner urges that this matter should be consolidated with that case. Alternatively, this matter should be held in abeyance pending a decision in *Glenn*.

As in *Glenn*, petitioner urges that the discretion afforded respondent should be attenuated, arguably to a point of *de novo* review. *Firestone Tire & Rubber*, 489 U.S. at 115, 109 S.Ct. 948 held,"[I]f a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a `facto[r] in determining whether there is an abuse of discretion.'" (internal citation omitted). Discretion was accorded respondent in the plan in the instant case.

The additional bases urged by petitioner for reducing the deference accorded respondent included:

1. Crediting the findings of Dr. Goldstein when his findings were obviously based upon evidence which actually supports a limitation to sedentary work;

2. Compounding the foregoing by stating in its first denial that 1 ½ miles in 35 minutes equates to three miles in one hour;

3. Crediting the findings of Dr. Goldstein and Dr. Cren, when they based their findings on cardiac testing which they inaccurately described as "negative" and which was performed four months before petitioner quit working and crediting Dr. Caren when he admitted that the testing upon which he relied did not apply to petitioner's anatomical condition;

4. Failing to provide the records of Dr. Sotolongo to Dr. Goldstein;

5. Referring to Dr. Kusnick's letter as a letter of advocacy;

6. Advising the consultants of the functional capacity required to deny benefits;

7. Failing to give any consideration to, or to ask their consultants to consider, the effects of stress on petitioner's cardiac condition; and

8. Urging that the possible effects of continued work is not a proper basis for disability.

Petitioner urges that, even had respondent not violated the instructions of *Nord* so that the case rested on the facts alone, no, or very little, deference should be afforded respondent.

Petitioner is aware that writs of certiorari have been granted in *Glenn*, so that, again, petitioner urges that this matter should be consolidated with that case. Failing that, petitioner's argument in support of this contention would be of little value pending this Court's decision in *Glenn*. Should the Supreme Court decision in *Glenn* alter the standard opf review in the instant case, the matter should be remanded and/or reversed.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner
DATE: April 2, 2008